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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CARL DUBOSE, Defendant and Appellant.	A156045 (Alameda County Super. Ct. No. 177163)

A jury found defendant Carl Dubose guilty of second-degree murder and shooting at an occupied car, and also found true personal firearm use enhancements on these counts. At trial, defendant claimed he acted in self-defense because the driver of the vehicle he fired upon, Luis G.,[1] had gang tattoos, flashed gang signs, and appeared to be reaching for a gun. On appeal, defendant contends the trial court erred in barring a gang expert from testifying that one of Luis G.'s tattoos was "consistent" with gang affiliation. Defendant also raises claims of ineffective assistance of counsel and prosecutorial misconduct. Finally, defendant contends, and the People concede, the case must be remanded in order to allow the trial court to

[1] Pursuant to the California Rules of Court, rule 8.90, governing "Privacy in opinions," we refer to certain witnesses by their first names and last initials.

exercise its discretion to strike the firearm enhancements. We will remand for resentencing, but otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was charged by information with first-degree murder (Pen. Code, § 187, subd. (a); count one)[2], attempted murder (§§ 187, subd. (a), 664; count two), and shooting at an occupied vehicle (§ 246; count three). The information alleged firearm use and great bodily injury enhancements for all three counts (§§ 12022.7, subd. (a), 12022.53, subd. (d)), and a special circumstance allegation for shooting from a motor vehicle (§ 190.2, subd. (a)(21)) for the murder charge.

Prosecution witness Luis G. offered the following testimony at trial. Luis G. was driving southbound on 98th Avenue in Oakland with Perla Avina Anaya in the front passenger seat. As Luis G. drove in the right-hand lane closest to the sidewalk, defendant's vehicle exited from a driveway and cut in front of Luis G. Luis G. braked hard and went into the left-hand lane to avoid a collision.

Luis G. raised his hands up to chest level, with his elbows bent and palms up towards his body, to convey to defendant, " 'I almost hit you,' " and "what are you doing[?]" Luis G. denied that he yelled at defendant, that he said he was "an OG, old gangster, or words to that effect," and that he threw gang signs at defendant.[3] Defendant nodded his head and appeared "like he didn't care" before moving into the left hand lane, with Luis G. behind him.

At a stoplight at the intersection of Edes Avenue and 98th Avenue, defendant looked back at Luis G. through the rear-view mirror while

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[2] Further statutory references are to the Penal Code unless otherwise stated.

[3] Luis G. testified he was never in a gang, and defendant presented no evidence at trial to dispute this.

appearing to move his shoulders. At the same time, defendant's girlfriend Amanda C., who was seated in the passenger seat, turned and looked at Luis G. and Anaya. Luis G. again gestured to defendant, "trying to get an apology from him. Just like roll the window down, you know."

The light turned green, and both cars began driving. As the two cars passed a gas station, defendant moved into the right lane and slowed down to pull alongside Luis G.'s car. Luis G. became concerned because he noticed defendant looking at him and Anaya. When defendant's car was nearly parallel to Luis G.'s car, defendant rolled down his window and mouthed the F-word. Seconds later, defendant lifted up a handgun with his right hand, reached over his left shoulder and fired. Anaya was shot in the face and collapsed. Defendant shot again, shattering Luis G.'s window and windshield. Luis G. turned his car around and drove in the other direction.

Luis G. drove to his home and called out to his neighbor, Dwayne J., for help. Dwayne J. called 911 and started CPR on Anaya, but she was not responsive. Officer John Hargraves arrived at the scene and began administering CPR on Anaya. Paramedics arrived but Anaya died at the scene.

While Dwayne J. was calling 911, Luis G. went inside the house and grabbed his gun because he was fearful that defendant might show up. Luis G. was on probation for felony domestic violence at the time and was not permitted to have a gun. He kept the gun (without the magazine) in a locked case in a closet in Anaya's room. Luis G. grabbed the gun and ammunition but left the weapon by a garbage can because he knew the police were coming. He denied having the gun in the car with him at the time of the shooting. Dwayne J. testified he did not see a gun inside Luis G.'s vehicle or in his hand, and another neighbor testified he did not see anyone remove

anything from the car. Officer Hargraves likewise testified he did not see Luis G. with a gun.[4]

Police sergeants testified at trial that Luis G. provided the police with a description of defendant and his car, and that gas station surveillance footage showed a vehicle matching that description. Three days after the shooting, defendant was arrested at a friend's house in Elk Grove. When the police arrived, defendant attempted to escape through the backyard. Officers searched the house and found a handgun in the toilet tank, and subsequent testing matched the gun to shell casings found at the scene of the shooting.

Defendant took the stand in his defense. He testified that Luis G. nearly hit him as he pulled into traffic on 98th Avenue and that he shot at Luis G.'s car in self-defense. At the time of the initial confrontation, defendant saw tattoos on Luis G.'s arm, including a star tattoo, which he thought could be a Norteños gang tattoo. Defendant tried to drive away from Luis G., but Luis G. followed him into the left lane. Defendant became concerned and pulled out his gun a few seconds before reaching the intersection of Edes and 98th. Defendant testified he had purchased the gun shortly before the shooting to protect Amanda C., who was working as a prostitute at the time and had once been kidnapped.

While the cars were stopped at the intersection, Luis G. purportedly made "hand gestures" that "appeared to be gang signs" at defendant. Defendant had seen gang signs being thrown many times, and he believed

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[4] Luis G. initially told police he did not have a gun and did not go outside with a gun, but he later admitted in a follow-up interview that he retrieved the gun while paramedics were working on Anaya. A police sergeant testified that while he saw velocity blood patterns in Luis G.'s car, he did not see similar patterns on the gun. A criminalist testified that Luis G.'s firearm had red stains but that the cartridges and magazine did not.

"most of the time violence follows gang signs." Asked what the gang signs looked like, defendant responded, "it's hard to say" and he could not "do exactly the exact ones."

After the cars passed through the intersection, defendant moved his vehicle into the right-hand lane "[b]ecause [Luis G.] was still behind my car and I didn't know what his intentions were. So I got over. I didn't want him taking down my license plates or anything like that. I didn't know what he was doing, so I just got over to get him from behind me."

Defendant testified that while he was stopped at a red light, Luis G.'s car pulled up alongside him. Luis G.'s passenger side window was halfway open and defendant asked, " 'What's the problem?' " Luis G. said "something about being an OG and me being a youngster and needing to respect the OGs." Defendant responded that he did not know anything about OGs and raised his gun, pointed it in the air, and brought it back down. In defendant's words, this was "a show of force." He then saw Luis G. "reaching down between his legs." Defendant believed Luis G. was reaching for a gun but could not recall if he had actually seen Luis G. holding a gun. Defendant opened fire, but claimed he had no intention of shooting anyone.

In explaining his reaction, defendant testified that "growing up in Oakland, disagreements can turn deadly very fast, so it's a different mind state that I would have from everyone else unless you were from the area and you understand Oakland." According to defendant, "OG" means "Original gangster," or "an older person from the hood."

When asked on cross-examination about surveillance footage showing that defendant returned to the scene of the shooting only 16 seconds later, defendant explained that he returned to see if he had shot anybody, but he could see from Edes Avenue that "no one was down there."

In a recorded jail phone call played at trial, defendant told his brother that he had brandished the gun because Luis G. "just kept talking about being OG and saying what he was saying." Defendant explained he told Luis G., " ' "Like, bro, check this out, bro. You might want to go about your day." ' "

Amanda C. testified the incident began when Luis G. would not let defendant pull onto 98th Avenue in front of him. She said Luis G. followed them and pulled his car alongside them at a stoplight. She recalled Luis G. saying "I'm an OG" and reaching under his seat before defendant started firing. Amanda C. did not see Luis G. with a gun.

The jury found defendant guilty of second-degree murder and shooting at an occupied car, and found true the great bodily injury and personal gun-use enhancements on these counts. The jury acquitted defendant of attempted murder. The trial court sentenced defendant to 40-years-to-life, which included 15-years-to-life for count one, 25 years-to-life for the gun-use enhancement on that count, five years (stayed) for count three, and 25 years-to-life (stayed) for the personal gun-use enhancement on that count. The trial court stayed the remaining enhancements and imposed various fines and assessments.

Defendant appealed.

DISCUSSION

A. Exclusion of Gang Expert Testimony

Defendant argues the trial court abused its discretion in excluding the testimony of gang expert Martin Flores regarding Luis G.'s tattoos.

1. Background

At trial, defendant sought to call Flores as a gang expert. Defense counsel explained that when asked to comment on Luis G.'s tattoos, Flores

said "he could not state that because someone had those tattoos, he was a member of a gang and he would not state that. But he would say that it would be consistent with a Norteño type of tattoo, the NorCal and the star. . . . [¶] . . . We are not going to say that [Mr. Luis G.] is a gang member. I have no information that he's even affiliated or a wanna-be, anything like that. My goal, however, is to put before the jury the fact that those were potential gang-related consistent tattoos."[5]

The trial court excluded Flores's testimony. As the court noted, defendant "was only able to identify one tattoo that he thought specifically he could see. And that was the star." Thus, the court believed the prosecutor would likely attempt to refute Flores's testimony, "opening up a bit of a mini-trial, so to speak, on the issue of gang-related issues, which are very, very sensitive. [¶] The cases are very clear, whether it's a defendant who's being associated with a gang or somebody else, that that's a very hot—sort of hot button issue for juries." The court further found that the proposed expert testimony "would be very minimally probative, but at the same time run the risk of getting us into a prolonged and undue consumption of time with respect to this issue."

2. Analysis

A trial court has wide discretion to admit or exclude expert testimony, and its ruling will not be reversed absent a clear abuse of discretion. (*People v. Valdez* (1997) 58 Cal.App.4th 494, 506.) "Gang evidence is admissible if it is logically relevant to some material issue in the case other than character evidence, is not more prejudicial than probative, and is not cumulative."

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[5] It does not appear that Flores was offered to testify on Luis G.'s purported flashing of gang signs. Indeed, there appeared no foundation for Flores to do so, as defendant did not describe or demonstrate any of the gang signs Luis G. purportedly made.

(*People v. Avitia* (2005) 127 Cal.App.4th 185, 192 (*Avitia*).) Even if evidence is relevant, trial courts have discretion to exclude it under Evidence Code section 352 "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352; see *Avitia*, *supra*, 127 Cal.App.4th at p. 192 [trial court should "carefully scrutinize" gang evidence because it "may have a highly inflammatory impact on the jury"].)

Here, the gang expert testimony was offered to support defendant's claims of complete and imperfect self-defense. " 'A person claiming self-defense is required to "prove his own frame of mind," and in so doing is "entitled to corroborate his testimony that he was in fear for his life by proving the reasonableness of such fear." ' " (*People v. Minifie* (1996) 13 Cal.4th 1055, 1065 (*Minifie*).) Reasonable self-defense is a complete defense to murder (*People v. Moye* (2009) 47 Cal.4th 537, 550), while under the doctrine of imperfect self-defense, a defendant who has killed under an actual but unreasonable belief of imminent danger of death or great bodily injury can be convicted of no crime greater than voluntary manslaughter. (*In re Christian S.* (1994) 7 Cal.4th 768, 771 (*Christian S.*).)

Flores's proposed testimony that Luis G.'s tattoo was "consistent" with a Norteño gang-type tattoo was relevant to defendant's claim that Luis G.'s gang appearance made him fearful for his life. The People, however, contend any probative value was substantially outweighed by the risk of confusing and inflaming the jury, as there was no evidence that Luis G. was a gang member. Furthermore, the People argue, the prosecution would have likely countered Flores with a competing expert, leading to a needless "mini-trial."

It is generally accepted that evidence of gang affiliation may be highly inflammatory. (*Avitia*, *supra*, 127 Cal.App.4th at p. 192.) But on the particular record here, it seems questionable whether this risk "substantially" outweighed the probative value of the proposed evidence under Evidence Code section 352. As proffered, Flores's testimony would have been limited to discussing Luis G.'s tattoos (perhaps just the star tattoo), and even if the prosecution called a competing expert, the combined testimony would likely not have consumed an "undue" amount of time. (See *Minifie*, *supra*, 13 Cal.4th at pp. 1070–1071.) And because the jury was already tasked with considering the evidence of Luis G.'s gang appearance and demeanor as it related to defendant's state of mind, it seems unlikely the inclusion of expert testimony on the topic would have been prejudicially confusing or inflammatory.

That said, even assuming the trial court erred by excluding Flores's testimony, we nevertheless would conclude the error was harmless under *People v. Watson* (1956) 46 Cal.2d 818. (*People v. Mincey* (1992) 2 Cal.4th 408, 440 [applying *Watson* to evidentiary error].) Under *Watson*, defendant must show it is reasonably probable he would have obtained a more favorable outcome had the court not erred. (*People v. Romero* (1999) 69 Cal.App.4th 846, 856–857.)

Although the trial court barred Flores's proposed testimony that Luis G.'s tattoo was consistent with a Norteño-type of tattoo, it nonetheless allowed defendant to testify that he saw Luis G. with a Norteño-like gang tattoo and that Luis G. flashed gang signs and claimed to be an "OG," which defendant understood to be a gang reference. Because defendant was not barred from testifying that Luis G.'s gang appearance and demeanor made

him fearful, Flores's testimony did not appear critical to establishing defendant's fear of Luis G. as a gang member.

At most, Flores's testimony would have buttressed the credibility and reasonableness of defendant's claimed belief that Luis G. was a gang member. But in finding defendant guilty of second-degree murder, the jury rejected defendant's theories of perfect and imperfect self-defense, and in doing so, necessarily found that defendant did not harbor an actual fear of imminent harm. (*Christian S.*, *supra*, 7 Cal.4th at p. 783 [no imperfect self-defense without actual fear of imminent harm].) The evidence at trial, including defendant's own testimony, amply supported the jury's finding that defendant did not actually believe Luis G. and his perceived gang affiliation posed a threat of imminent harm. Defendant testified that although he initially saw Luis G.'s tattoos and demeanor as a "threat," he "didn't really pay it much mind at that point." "I seen the tattoos. It made me wonder what's up with this dude." "He's behind—yeah, he's behind my car with gang signs. I thought he was angry. I didn't really think it would be much more than that." Defendant testified he moved into the right-hand lane, not in fear of imminent harm, but to prevent Luis G. from taking down his license plate number. When the two cars were nearly parallel, defendant called to Luis G. and asked what the problem was, and then brandished his gun in "a show of force." Thus, despite defendant's claimed fear due to Luis G.'s appearance and conduct, defendant never attempted to avoid Luis G. but instead confronted him while armed. Defendant's claim that he was genuinely fearful for his life when encountering Luis G. was further belied by his return to the scene of the shooting seconds later.

Moreover, during the jail phone call with his brother, defendant did not mention a fear of Luis G. or of seeing Luis G.'s gang tattoos; instead,

defendant said he shot at Luis G. because he "just kept talking about being OG and saying what he was saying."

Finally, defendant's post-shooting conduct of fleeing to a friend's home in Elk Grove, hiding the gun used in the offense, and attempting to flee when officers arrived at the friend's home supported an inference of defendant's consciousness of guilt. (*People v. Williams* (2013) 56 Cal.4th 630, 679.)

Because the evidence at trial substantially undermined any claim that defendant acted out of fear of imminent harm after seeing Luis G.'s tattoos and demeanor, it is not reasonably probable that Flores's proposed testimony would have led to a more favorable outcome for defendant. Any perceived error was harmless.

B. Ineffective Assistance of Counsel

To succeed on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness, and that there is a reasonable probability of a different outcome but for counsel's unprofessional errors. (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 690, 694.)

1. Failure to Cite Case Law

In *People v. Sotelo-Urena* (2016) 4 Cal.App.5th 732 (*Sotelo-Urena*), the defendant, who was homeless, was charged with first-degree murder of another homeless man. (*Id.* at p. 736.) Claiming self-defense, the defendant sought to introduce expert testimony on the heightened sensitivity of homeless individuals to perceived threats of violence. (*Id.* at p. 742.) The trial court excluded the testimony as irrelevant, but Division Two of this court reversed, concluding the expert's testimony was relevant to the defendant's actual belief in the need to use lethal force in self-defense, the reasonableness of that belief, and the defendant's credibility. (*Id.* at pp. 745–

753.) Defendant argues he was denied effective assistance because his trial counsel failed to cite *Sotelo-Urena* in support of the motion to admit Flores's gang expert testimony. We are not persuaded.

Notably, the record is silent as to why defense counsel did not cite *Sotelo-Urena*, and generally, where the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, the claim on appeal must be rejected unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)

Indeed, there appear several reasons why counsel might have found *Sotelo-Urena*, *supra*, 4 Cal.App.5th 732, unhelpful to defendant's case. First, *Sotelo-Urena* did not involve a proffer of gang expert testimony, which pertains to a topic that is potentially far more inflammatory than homelessness. (See *Avitia*, *supra*, 127 Cal.App.4th at p. 192.) Second, *Sotelo-Urena* addressed only the issue of relevance (*Sotelo-Urena*, at pp. 745–753), not Evidence Code section 352 balancing, and here the trial court had already accepted that Flores's testimony had some probative value. Third, while both *Sotelo-Urena* and the instant case involve expert testimony proffered in support of a defendant's claim of self-defense, the expert in *Sotelo-Urena* was "prepared to testify that individuals who are chronically homeless, like [the] defendant, are subjected to a high rate of violence by both housed and homeless individuals, and that the experience of living for years on the streets instills a perpetual fear of violence that would have affected defendant's belief in the need to defend himself with lethal force." (*Sotelo-Urena*, at pp. 745–746.) Here, however, the record discloses Flores would simply have testified that Luis G. had a tattoo consistent with a Norteño-type

of tattoo. Because the facts of *Sotelo-Urena* were plainly distinguishable, there appears no basis for finding fault with counsel's omission.

Finally, and in any event, even if counsel had cited *Sotelo-Urena*, it is not reasonably probable that this would have convinced the trial court to admit Flores's testimony, or that the testimony, if admitted, would have led to a more favorable outcome for defendant. In *Sotelo-Urena*, the evidence at issue—which included the defendant's account of the killing to the police; his post-attack conduct of waiting near the crime scene for the police to arrive; and the witnesses' testimony of events before and during the attack[6]—was fully consistent with the defendant's claim that he acted in self-defense against someone he believed had previously attacked him. Accordingly, the expert testimony that chronically homeless individuals have a greater sensitivity to threats of violence would have fit within the evidence to substantiate the defendant's claim of fear. Here, in contrast, the evidence at trial—particularly defendant's own testimony, statements, and conduct—substantially undermined his claim of imminent peril based on Luis G.'s tattoos and demeanor. In light of such evidence, it is not reasonably probable that Flores's proposed gang expert testimony, which would have focused solely on Luis G.'s tattoos, would have changed the outcome of trial.

2. Failure to Object to Questions Regarding Amanda C.'s Prostitution

The prosecution moved to admit evidence that Amanda C. was engaged in prostitution activities in order to impeach her credibility as a witness. Defendant opposed the motion on the grounds the evidence was not probative

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[6] A witness saw the victim taking methamphetamine and acting aggressively shortly before the encounter with defendant. (*Sotelo-Urena*, *supra*, 4 Cal.App.5th at p. 737.) Another witness who heard the attack described one of the men violently yelling before the two men began scuffling. (*Id.* at p. 740.)

of Amanda C.'s credibility and would prejudicially suggest that defendant was her pimp. The trial court granted the motion, stating, "Given [the prosecutor's] stated purpose limited to her credibility, . . . I'm going to allow her to be questioned about that fact only. We're not going to go any further into any details of her goings on or her doings."

During trial, the prosecutor asked defendant, "when [Amanda C.] was prostituting, you were protecting her with that gun; isn't that true?" The prosecutor further asked defendant whether Amanda C. gave him half of her money. Defendant responded that Amanda C. "would give me some money, yes, she would," that he had the gun in case something happened to her, and that when she was done with her prostitution activities, she would come back to him. Defense counsel did not object.

On appeal, defendant contends he was deprived of effective assistance of counsel because the prosecutor's questioning went beyond the scope of the trial court's ruling, and his counsel's failure to object left the jury with a prejudicial impression of defendant, i.e., that he was her pimp.

Assuming the questioning exceeded the scope of the trial court's ruling, the record is silent as to the basis for defense counsel's failure to object. "We have long recognized that counsel's decision whether or not to object to inadmissible evidence is a matter of trial tactics. [Citation.] Because we accord great deference to trial counsel's tactical decisions, counsel's failure to object rarely provides a basis for finding incompetence of counsel." (*People v. Lewis* (2001) 25 Cal.4th 610, 661.)

We may reasonably assume that defense counsel had tactical reasons for not objecting to the particular questioning, and instead chose to address any negative implications more substantively during redirect and closing arguments. On redirect, counsel elicited defendant's testimony that he gave

Amanda C. money, lived with her, did not beat her, and carried a gun primarily to protect her. During closing arguments, defense counsel disputed the implication that defendant was a "bad person" because "he was living with a prostitute and therefore he had to be a pimp." Counsel argued that Amanda C. and defendant were "lovers" and "boyfriend and girlfriend. That's why she still says to this day he's a good person. He never beat her. [¶] He shared his money with her and she shared her money with him. . . . [¶] A love story was being converted into something really sordid." In this way, defense counsel could reasonably have believed there was a strategic benefit in allowing the jurors to hear testimony that defendant was protective and caring, as well as an explanation for why defendant had the gun other than for situations like the charged offenses.

Finally, even assuming an objection was made and sustained, we see no reasonable probability of a better outcome for defendant given the strong evidence supporting defendant's guilt, as already discussed.

C. Prosecutorial Misconduct

Defendant argues the prosecutor committed misconduct by arguing facts not in evidence regarding the meaning of the term "OG."

During closing arguments, the defense repeatedly highlighted the evidence that Luis G. referred to himself as an "OG." During rebuttal argument, the prosecutor told the jury he had just come across a news headline stating, " 'WNBA OG Being Forgotten By Her Own Sport.' " The prosecutor went on to explain that the article said, " 'Put some respect on Candice Parker's name as she begins her 11th WNBA season. Candice dropped knowledge of what it's like being an OG in the game. Plenty left in the tank.' " The prosecutor then argued, "Now, to say original gangster means you're a gangster is a joke. So do you believe this writer is trying to

be—to slander Candice Parker by calling her an OG? No. It's called respect. It's called respect. [¶] He's trying to say that [Luis G.] by asking the defendant to give him respect is basically a thug out there with a gun trying to intimidate his client to make him have to do something. In today's society, an OG isn't seen as a derogatory word or phrase. When you call an older person an OG, that's a sign of respect. [¶] So when someone says, 'I'm an OG, you need to respect, you're younger than me,' that means you need to learn how to treat people, how to talk to people, how to act with people."

A prosecutor is given "wide latitude" during argument. (*People v. Ghobrial* (2018) 5 Cal.5th 250, 289.) " ' "A prosecutor's misconduct violates the Fourteenth Amendment to the United States Constitution when it 'infects the trial with such unfairness as to make the conviction a denial of due process.' " ' " (*People v. Powell* (2018) 6 Cal.5th 136, 171.) The misconduct must be " 'of sufficient significance to result in the denial of the defendant's right to a fair trial.' " (*Id.* at p. 172.) And even if the misconduct does not render trial fundamentally unfair, it still violates California law if it involves "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Hoyt* (2020) 8 Cal.5th 892, 943 (*Hoyt*).)

"It is well settled that it is misconduct for a prosecutor to base argument on facts not in evidence." (*People v. Mendoza* (2016) 62 Cal.4th 856, 906.) " '[S]uch statements "tend[] to make the prosecutor his own witness—offering unsworn testimony not subject to cross-examination. It has been recognized that such testimony, 'although worthless as a matter of law, can be "dynamite" to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence.' [Citations.]" [Citations.] "Statements of supposed facts not in evidence . . .

are a highly prejudicial form of misconduct, and a frequent basis for reversal." ' " (*People v. Rodriguez* (2020) 9 Cal.5th 474, 480 (*Rodriguez*).)

We agree the prosecutor should have known better than to quote from a news article that was not in evidence. However, defendant failed to object to the challenged statements at trial and has not shown that an objection would have been futile or that any adverse effect of the challenged statements could not have been cured by admonition. Thus, defendant forfeited the claim of error. (*Hoyt*, *supra*, 8 Cal.5th at pp. 942–943.)

Furthermore, the prosecutor's departure from propriety was not of such significance as to infect the trial with unfairness or deny defendant due process or a fair trial, nor did it rise to the level of deceptive or reprehensible methods to attempt to persuade the jury. (*People v. Hill* (1967) 66 Cal.2d 536, 561 [prosecutor "cannot be charged with misconduct if his comments only spill over somewhat into a forbidden area; the departure from propriety must be a substantial one"].) As discussed, defendant was given the opportunity to put forth his understanding of the meaning of the term "OG." The news article in question did not directly relate to this case, and the prosecutor did not allude to any case-specific facts available solely to the government. On this record, we find no substantial impropriety to warrant reversal of the conviction.

D. Cumulative Error

Defendant contends the cumulative effect of errors in his case requires reversal of the judgment. " 'Under the cumulative error doctrine, the reviewing court must "review each allegation and assess the cumulative effect of any errors to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their absence." ' [Citation.] 'The "litmus test" for cumulative error is "whether defendant received due

process and a fair trial.' " (*People v. Mireles* (2018) 21 Cal.App.5th 237, 249.) We conclude that any perceived errors were not prejudicial, either individually or cumulatively, and that defendant received due process and a fair trial. We accordingly reject his claim of cumulative error.

E. Firearm Enhancements

Defendant argues, and the People concede, that he is entitled to resentencing because the trial court was unaware of its discretion to strike the firearm enhancements.

Prior to the imposition of the sentence in this case, Senate Bill No. 620 went into effect, amending section 12022.5, subdivision (c), and section 12022.53, subdivision (h), to provide that " '[t]he court may, in the interest of justice pursuant to [s]ection 1385 and at the time of sentencing, strike or dismiss an enhancement' " otherwise required to be imposed by sections 12022.5 or 12022.53. The change in law applies retroactively to individuals, like defendant here, whose sentences were not final at the time Senate Bill No. 620 became effective. (*People v. Zamora* (2019) 35 Cal.App.5th 200, 208.)

A trial court is presumed to have been aware of and followed the applicable law. (*People v. Martinez* (1998) 65 Cal.App.4th 1511, 1517.) But when the record shows that a trial court acted on the erroneous assumption it lacked discretion in sentencing, a remand is necessary so that the trial court may have the opportunity to exercise such discretion. (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.)

Here, the record discloses that the trial court was not aware of its discretion to strike the firearm enhancements. Neither the prosecutor nor the defense mentioned the trial court's sentencing discretion, and we see no "clear indication" in the record as to how the court might have exercised its discretion. (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 423.) Thus, we

will remand so that the trial court may exercise its discretion whether to strike the firearm enhancements under section 12022.53, subdivision (d).

DISPOSITION

The sentence is vacated, and the matter is remanded to allow the trial court to exercise its discretion under section 12022.53, subdivision (h), whether to strike the firearm enhancements imposed under section 12022.53, subdivision (d). The trial court shall resentence defendant accordingly, and if necessary, shall forward a certified copy of an amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

FUJISAKI, J.

We concur.

SIGGINS, P.J.

PETROU, J.

(A156045)